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No. 597

In the Supreme Court of the United States

OCTOBER TERM, 1967

UNITED STATES OF AMERICA, APPELLANT

v.

UNITED SHOE MACHINERY CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY BRIEF FOR THE UNITED STATES

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We limit ourselves here to responding to only one contention in United's brief—that the district court should not have used United's current revenues to determine that its share of the shoe machinery market was approximately 62 percent, but instead should have relied upon other data which would have produced a lower figure.

The district court found "that United has about three-fifths to two-thirds of the shoe machinery market now * * *" (A. 77). It based this upon United's 62 percent share of the shoe machinery industry total

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revenues (A. 76). Respondent argues, however, that the district court should have relied upon two different measures, under which its market share would be between 48 and 51 percent (A. 80), *viz.* (1) the 1963 percentage of the total number of machines located in shoe factories which had been supplied by United, based on physical count (United Br. 8, 11), and (2) the 1963 percentage of shoe machines shipped which were shipped by United, based on dollar value (United Br. 8, 19–20, 28–30). The district court correctly rejected these criteria as inadequate gauges of market power.

It found not only that the revenue figure was a far more satisfactory index of market share than those proposed by United (A. 76),[1] but also that many other factors confirmed the correctness of the conclusion derived from that measure (A. 77). United—paradoxically for an appellee—challenges these findings as clearly erroneous. But both the record and the court's opinion confirm their correctness. As the district court found, United's suggested indicia would not accurately reflect its share of the entire market (A. 80).

Ordinarily, market share is determined by current sales, which are normally equivalent to gross reve-

[1] Indeed, the district court explicitly stated (A. 76): "The aforesaid revenue percentage of the shoe machinery market is a far more satisfactory index of share of the market than any other suggested. That index is far more illuminating than one based on a mere count of machines in position in shoe factories without distinguishing the machines by type, or value, or yield. It is also more satisfactory than one based on the value of annual shipments, an index which disregards the payment of rentals upon or conversion prices for machines shipped in previous years."

nues. In the shoe machinery industry, however, current sales are only a part of the picture. Most shoe factories lease rather than buy machines because they do not choose to invest substantial capital in expensive machines which cannot be easily disposed of; indeed, many shoemakers could not survive at all without leasing (A. 77–78). Sales, therefore, represent only a fraction of total shoe machinery transactions. The great bulk of United's business consists of new rentals, renewal of leases of rented machines already installed, and the purchase by users of rented machines (conversion sales).

Transactions involving rented machines in place are a particularly important indicium of United's market position because the decree in this case expressly prohibits United from granting an original or renewal lease for more than five years[2] (A. 2). Thus, shoe manufacturers constantly are making decisions about rented machines that directly affect United's business and, consequently, its share of the market. The transactions that result from such decisions are obviously as much a part of the market as factory sales or new leases, and must be taken into account. The yardstick chosen by the district court—current revenues—reflects all of the different types of market transactions. The two criteria advanced by United do not.

The mere counting of United's share of machines in place would not adequately reflect the shoe manu-

[2] In addition, under the decree leased machines may be returned by the lessee before the term has expired on payment of three months' charges plus damage and shipping costs (A. 2–3).

facturers' decisions to buy or rent machines, to renew leases or to convert to ownership. As the district court found, such a count does not distinguish machines by types, value or yield (A. 76); nor does it indicate whether the machines are owned or leased. Moreover, it involves a comparison of devices which vary greatly in value and complexity, thus ignoring differences between the relatively simple, minor machines which are more easily produced by the smaller firms in large numbers, and the higher-priced, major machines, as to which United continues to have a monopoly position.[3] Current shipments are similarly inadequate, since they omit the substantial volume of transactions involving United-owned machines in place, *i.e.*, renewals and conversion sales which are reflected in the revenue figure.[4]

The fact, which United stresses (Br. 33), that a large number of United's machines in place are relatively old does not justify ignoring the substantial volume of leasing transactions not reflected in current sales. Indeed that fact[5] suggests that the shoe ma-

[3] In all but two of the 18 major machine types in place as listed in the district court's original opinion (110 F. Supp. 295, 304–306), United's share in 1963 of each type exceeded 73 percent of the number of such machines, and its share for most of these types was much higher (A. 22).

[4] In 1963 United renewed leases for 3209 machines, as compared with current shipments of 2528 machines (261 machines sold and 2267 machines leased) (Pl. Exh. 74, Tr. 556–557; set out in the Appendix, *infra*, p. 7). In addition, in 1963 United realized approximately $1.8 million on conversion sales (A. 23).

[5] See Def. Exh. 16, set out in the Appendix, *infra*, pp. 7–8, showing that the great bulk of outstanding United machines were shipped during the periods 1933–1941 and 1945–1953.

chinery industry is plagued by that very lack of innovation that so frequently characterizes monopolized industries.[6] This was one of the evils which the 1953 decree was designed to correct. See *United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 347.[7]

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[6] The American shoe industry has on several occasions sought tariff or import quota protection for its products because of the rapidly rising sales of foreign shoes in this country. The reason for the rising sales of imports is the lack of technological superiority of American machines as well as lower wage rates paid by the foreign manufacturers. See statement of Alan Goldstein, President of the Plymouth Shoe Co., for the National Footwear Manufacturers Association, at Hearings before the Senate Finance Committee on Import Quotas Legislation, 90th Cong., 1st Sess., p. 424; statement of Harold O. Toor, Treasurer of the National Shoe Manufacturers Association, and representing the New England Shoe & Leather Association and the St. Louis Manufacturers Association, Hearings before the Senate Finance Committee on the Trade Expansion Act of 1962, 90th Cong., 1st Sess., Part 2, pp. 856, 860, 871; statement of Senator Edmund S. Muskie of Maine at the 1967 Import Quotas Hearings, *supra*, pp. 411, 412; see also statement by Abe Feinglass on behalf of the Fur and Leather Department, Amalgamated Meatcutters and Butcher Workmen (AFL–CIO), at the Import Quotas Hearings, *supra*, pp. 447–448.

[7] See also Peck, *Inventions in the Postwar American Aluminum Industry*, in *The Rate and Direction of Inventive Activity* (National Bureau of Economic Research, 1962) 279, 294–295. Peck's study showed—after comparing the innovative performance of the American aluminum industry prior to the government's antitrust action, when Alcoa had a monopoly, with that after the creation of several additional competitors—that innovation in that industry significantly improved.

CONCLUSION

For the reasons stated in our principal brief and in this reply brief, the order of the district court should be set aside and the case remanded for the consideration of further relief to restore effective competition in the shoe machinery market.

Respectfully submitted.

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Solicitor General.

DONALD F. TURNER,
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MARCH 1968.

APPENDIX

PLAINTIFF'S EXHIBIT 74

United Shoe Machinery Corporation—Shoe machinery activity,[1] domestic operations, annually,[2] 1953–64

	Leased shoe machines					Number of new shoe machines sold
	Number outstanding at year-end	Number returned [3]	Number shipped	Number of leases renewed	Number converted to sale	
1953	103,553	N.A.	N.A.	N.A.	0	N.A.
1954	101,222	N.A.	N.A.	N.A.	0	N.A.
1955	75,206	9,362	3,999	7,702	20,253	254
1956	64,528	6,369	3,826	2,358	8,022	522
1957	56,890	5,711	3,728	1,945	5,474	425
1958	50,016	5,777	3,868	1,348	4,842	310
1959	45,331	4,270	3,702	1,360	4,140	305
1960	38,968	6,322	4,382	4,941	4,432	218
1961	35,007	5,096	3,746	3,232	2,677	382
1962	31,616	4,498	3,032	3,311	2,086	205
1963	28,574	4,052	2,267	3,209	1,385	261
1964	26,718	3,704	2,357	2,419	678	277

[1] Data pertain, with the exception of the number of leased shoe machines outstanding at year-end and number of leased shoe machines returned, to shoe machines in shoe factories. The number of leased shoe machines outstanding at year-end and number of leased shoe machines returned include shoe machines in both shoe and nonshoe factories; shoe machines in nonshoe factories are agreed to vary between 5 and 10 percent of total.

[2] Data pertain to fiscal years ended on or about February 28 of the subsequent year.

[3] Includes returns from current and all previous years' shipments.

N.A.—Not available.

DEFENDANT'S EXHIBIT 16

Age of machines of USMC manufacture in USMC 1963 sample

Shipping year	Age in 1963	Leased machines	Owned machines	Total machines
1896	67	----	1	1
1897	66	----	3	3
1899	64	----	1	1
1900	63	----	2	2
1901	62	----	8	8
1902	61	----	6	6
1903	60	----	2	2
1904	59	----	8	8
1905	58	----	13	13
1906	57	----	16	16
1907	56	----	14	14
1908	55	----	15	15
1909	54	----	20	20
1910	53	----	36	31

Age of machines of USMC manufacture in USMC 1963 sample—Continued

Shipping year	Age in 1963	Leased machines	Owned machines	Total machines
1911	52		35	35
1912	51		20	20
1913	50		18	18
1914	49		15	15
1915	48		24	24
1916	47		42	42
1917	46		36	36
1918	45		38	38
1919	44		41	41
1920	43		44	44
1921	42		26	26
1922	41		41	41
1923	40		74	74
1924	39		71	71
1925	38		53	53
1926	37		32	32
1927	36		24	24
1928	35		43	43
1929	34		55	55
1930	33		28	28
1931	32		66	66
1932	31		44	44
1933	30	4	128	132
1934	29	1	137	138
1935	28	1	93	94
1936	27	1	162	163
1937	26	1	157	158
1938	25	3	125	128
1939	24	4	165	169
1940	23	2	123	125
1941	22	3	262	265
1942	21		48	48
1943	20		17	17
1944	19		23	23
1945	18	9	160	169
1946	17	1	175	176
1947	16	17	213	230
1948	15	23	188	211
1949	14	32	209	241
1950	13	60	213	273
1951	12	39	135	174
1952	11	101	171	272
1953	10	170	61	231
1954	9	142	68	210
1955	8	58	23	81
1956	7	51	32	83
1957	6	118	42	160
1958	5	181	15	196
1959	4	141	8	149
1960	3	162	15	177
1961	2	195	37	232
1962	1	244	7	251
1963	0	46	2	48
Total		1,810	4,169	5,979

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